

**SUBCHAPTER E. TEXAS WINDSTORM INSURANCE ASSOCIATION**  
**DIVISION 10. ELIGIBILITY AND FORMS**  
**28 TAC §5.4903 and §5.4905**

**1. INTRODUCTION.** The Commissioner of Insurance (Commissioner) adopts amendments to §5.4903 and §5.4905, concerning declination of coverage and minimum retained premium. The Commissioner also adopts a conforming amendment to the title of Title 28 Texas Administrative Code (28 TAC) Chapter 5, Subchapter E, Division 10. The sections are adopted with changes to the proposed text published in the October 14, 2011, issue of the *Texas Register* (36 TexReg 6868).

**2. REASONED JUSTIFICATION.** The amendments are necessary to implement legislative changes to the Insurance Code Chapter 2210 and amend the plan of operation of the Texas Windstorm Insurance Association (Association).

House Bill 3 (HB 3), 82nd Legislature, First Called Session, effective September 28, 2011, amends insurance coverage eligibility requirements in the Insurance Code §2210.202 concerning declination of coverage, and it is necessary that the new requirement for a declination on renewal every third year be integrated into the plan of operation in §5.4903. Additionally, HB 3 amends the minimum retained premium requirement set forth in the Insurance Code §2210.204, and it is necessary that the new 90-day minimum retained premium requirement be integrated into the plan of operation in §5.4905. Section 62(a) of HB 3 provides that the amendments to the Insurance Code §2210.202 and §2210.204 are effective for new and renewal coverage issued by the

Association on or after November 27, 2011, which is the 60th day after the September 28, 2011, effective date of HB 3. In accordance with Chapter 2210 of the Insurance Code, compliance with these requirements is essential to ensure the availability of Association insurance coverage for all eligible persons and properties.

**§5.4903. Declination of Coverage.**

The requirement under §5.4903(a)(1) that an applicant or applicant's agent must have received at least one such declination in order to obtain new Association coverage continues the existing rule requirement. In response to a comment, the Department has revised subsection (a)(1), removing the limiting phrase "on a structure" because the phrase had the unintended effect of excluding "contents only" policies. The requirement under §5.4903(a)(2) that an applicant or applicant's agent must have received at least one such declination every three calendar years in order to obtain renewal Association insurance coverage implements the HB 3 amendment to the Insurance Code §2210.202, which requires evidence of one declination every three calendar years with an application for renewal of an Association policy.

The phrase "new or renewal" is deleted in existing §5.4903(a). The declination requirement for new coverage is now addressed under new §5.4903(a)(1), and the declination requirement for renewal coverage is now addressed under new §5.4903(a)(2).

**§5.4905. Minimum Retained Premium.**

Section 5.4905 establishes the minimum retained premium for Association policyholders required by the Insurance Code §2210.204. The Insurance Code

§2210.204(c) provides that the Association shall have a minimum retained premium set forth in the plan of operation. HB 3 amends the Insurance Code §2210.204(e) to provide that the minimum retained premium in the plan of operation must be for a period of not less than 90 days, except for certain events specified in the plan of operation. Before the HB 3 amendment, the Insurance Code §2210.204(e) required the minimum retained premium in the plan of operation to be for a period of not less than 180 days, except for certain events specified in the plan of operation, as established by House Bill 4409 (HB 4409), 81st Legislature, Regular Session.

Section 5.4905(a)(1)(A) amends the time period from 180 days to 90 days for policies that become effective on and after November 27, 2011, and subsection (a)(1)(B) retains the 180 day time period for policies that become effective before November 27, 2011, in order to implement HB 3. The Department revised subsection (a) as a result of comment to specify the requirements for policies that become effective before November 27, 2011, or on and after that date, to clarify the requirements for both categories of policies. This revision also resulted in non-substantive, conforming restructuring.

Section 5.4905(a) also continues the \$100 minimum retained premium that was first adopted under §5.4501, effective June 15, 1999, and was incorporated into §5.4905 effective February 24, 2010.

Existing §5.4905(c) is deleted. The Department previously determined that the existing 180-day minimum premium requirement could potentially have a disproportionate adverse effect on persons relying on premium financing to obtain

Association insurance coverage (premium finance customers). Requiring the Association to withhold a full minimum premium would require premium finance customers to make a deposit in excess of 50 percent of the policyholder's annual premium, which the Department determined was considerably more than current financing practices require and could effectively eliminate this option for those persons most in need of financing the premium.

However, because HB 3 changes the 180-day minimum premium requirement to a 90-day minimum premium requirement, the Department has determined that such a requirement does not have a disproportionate adverse effect on premium finance customers. Requiring the Association to withhold a full minimum premium would no longer require premium finance customers to make a deposit in excess of 50 percent of the policyholder's annual premium.

Because the exception in existing §5.4905(c) is deleted, §5.4905(d), the second sentence of existing subsection (f), and (g), which administered existing §5.4905(c), are also no longer necessary and are deleted.

As a result of comment, the Department has retained the provision under §5.4905(e), redesignated as subsection (c), which was proposed for deletion. The Department has revised the sentence by replacing "is indebted to the Association" with the phrase "owes premium" as a non-substantive, clarifying change.

Existing subsection (f) is redesignated as subsection (d), as a conforming, non-substantive change.

Because the Department is implementing additional legislative changes, a conforming amendment to the title of Title 28 TAC Chapter 5, Subchapter E, Division 10, is also adopted.

**3. HOW THE SECTIONS WILL FUNCTION.** Section 5.4903 specifies the declination of coverage requirements an applicant or applicant's agent must satisfy prior to obtaining Association new or renewal coverage. Section 5.4905 specifies the minimum retained premium on an Association policy and how it is applied to an Association policy.

**4. SUMMARY OF COMMENTS AND AGENCY RESPONSE.**

**Comment:** A commenter recommends deleting "on a structure" under proposed §5.4903(a)(1) because the proposed language incorrectly limits (a)(1) to a structure, while the original rule is applicable for a property. The commenter asserts that there is no legislative intent for this limitation and that the limitation would impact those policyholders with "contents only" policies. The commenter says that the suggested deletion would maintain the three year requirements for all coverages pursuant to the legislative intent of HB 3.

**Agency Response:** The Department agrees and has made the suggested change.

**Comment:** A commenter recommends restructuring and amending proposed §5.4905(a) to state: "Except as provided in this section, the minimum retained premium

on an Association policy issued on an annual basis shall: (1) On policies effective on and after November 27, 2011, be a premium amount equal to the greater of 90 days of the annual policy term or \$100; or (2) On policies effective before November 27, 2011, be the premium amount equal to the greater of 180 days of the annual policy term or \$100. The minimum retained premium shall be fully earned on the effective date of the policy. Unearned premium in excess of the minimum retained premium set forth in this subsection shall be refunded pro-rata.” The commenter says that as the Association transitions into new policies issued on and after November 27, 2011, the requirements for existing Association policies that predate the HB 3 requirements need to be addressed, because they will be active concurrently with the new policies being issued with the 90-day minimum retained premium. The commenter further asserts that existing §5.4905 must continue in effect until existing policies with the pre-HB 3 requirements have exceeded the 180-day requirement.

**Agency Response:** The Department agrees that addressing policies that become effective before November 27, 2011, and those that become effective on and after November 27, 2011, in the text will clarify the requirements for both categories of policies. The Department has revised §5.4905(a) to state, “Except as provided in this section, the minimum retained premium on an Association policy issued on an annual basis shall be: (1) equal to the greater of: (A) 90 days of the annual policy term or \$100, for policies that become effective on and after November 27, 2011; or (B) 180 days of the annual policy term or \$100, for policies that become effective before November 27, 2011; and (2) fully earned on the effective date of the policy. Unearned

premium in excess of the minimum retained premium set forth in this subsection shall be refunded pro-rata.”

In response to the comment that existing §5.4905 must continue in effect for a certain time period, the Department declines to further revise the text, asserting that the clarification for policies that become effective before November 27, 2011, is sufficient.

**Comment:** A commenter recommends retaining existing §5.4905(e) as redesignated §5.4905(c), because the total amount due to the Association from former Association policyholders is almost \$1.2 million. The commenter asserts that removing this requirement would extinguish any debt currently owed to the Association by policyholders without due process. The commenter further states that these policyholders should be required to pay back their debt before the Association will issue a new policy, because the Association obtained this debt after implementation of the requirements for a 180-day minimum retained premium pursuant to HB 4409, 81st Legislature, and the adoption of §5.4905, effective February 24, 2010.

**Agency Response:** The Department does not intend to extinguish existing debts and therefore retains existing §5.4905(e), redesignated as §5.4905(c). The Department replaces the phrase “is indebted to the Association” with the phrase “owes premium” as a non-substantive, clarifying change.

**Comment:** A commenter suggests adding a new subsection (e) to state, “This section does not apply to builder’s risk policies issued by the Association.” The commenter states that this language is necessary because no rule currently addresses builder’s risk policies.

**Agency Response:** The Department declines to make the suggested change. The commenter's suggested language adds content that was not included in the proposal; therefore, required notice of this substantive provision was not provided prior to adoption. Further, HB 3, which the Department is implementing by the adoption of these rules, does not specifically address builder's risk policies issued by the Association.

#### **5. NAMES OF THOSE COMMENTING ON THE PROPOSAL.**

**Neither for nor against, with recommended changes:** Texas Windstorm Insurance Association.

**6. STATUTORY AUTHORITY.** Amendments to §5.4903 and §5.4905 are adopted under the Insurance Code §§2210.008, 2210.151, 2210.152, 2210.202, 2210.204, and 36.001. Section 2210.008(b) authorizes the Commissioner to adopt reasonable and necessary rules in the manner prescribed in Subchapter A, Chapter 36, Insurance Code. Section 2210.151 authorizes the Commissioner to adopt the Association's plan of operation to provide Texas windstorm and hail insurance coverage in the catastrophe area by rule. Section 2210.152 provides that the Association's plan of operation provide for the efficient, economical, fair, and nondiscriminatory administration of the Association and include both underwriting standards and other provisions considered necessary by the Department to implement the purposes of the Insurance Code Chapter 2210. Section 2210.202(a) requires that a declination be defined in the

Association's plan of operation and that one declination every three calendar years is required with an application for renewal of an Association policy. Section 2210.202(b) requires the agent to possess proof of the declination described by §2210.202(a). Section 2210.204(d) and (e) require that the minimum retained premium be set forth in the plan of operation. Section 2210.204(e) provides that for cancellation of insurance coverage under §2210.204, the minimum retained premium in the plan of operation must be for a period of not less than 90 days, except for certain events specified in the plan of operation. It also requires that the plan of operation specify events that reflect a significant change in the exposure, or the policyholder, concerning the insured property that would be exempt from the minimum retained premium requirement. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of the state.

## **7. TEXT.**

### **DIVISION 10. ELIGIBILITY AND FORMS**

#### **§5.4903. Declination of Coverage.**

(a) To be eligible to obtain windstorm and hail insurance coverage from the Association for a property, an applicant or applicant's agent must have received at least one declination of coverage for the property from an insurer authorized to engage in the business of, and writing, property insurance providing windstorm and hail insurance coverage in the first tier coastal counties:

(1) in order to obtain new Association coverage; and

(2) every three calendar years, in order to obtain renewal Association coverage.

(b) The following words and terms when used in this division shall have the following meanings unless the context clearly indicates otherwise:

(1) Authorized insurer and insurer authorized--An insurer operating under a certificate of authority issued by the Texas Department of Insurance.

(2) Declination--

(A) A refusal to offer or a refusal to renew coverage for the perils of windstorm and hail from an authorized insurer; or

(B) An offer of a policy that includes coverage for the perils of windstorm and hail that is not substantially equivalent to the coverage offered by the Association. A policy is not substantially equivalent to an Association policy if the policy that is being offered does not provide the basic coverage(s) that the applicant is seeking. For example, a policy being offered to the applicant that includes coverage for the perils of windstorm and hail is not substantially equivalent to the coverage offered by the Association:

(i) when the applicant is seeking a policy that provides coverage on a replacement cost basis and the policy being offered to the applicant only provides coverage on an actual cash value basis; or

(ii) when the applicant is seeking a policy with a certain windstorm and hail deductible amount and the windstorm and hail deductible amount on the policy being offered is in excess of that amount.

(3) Writing--Offering new or renewal coverage.

(c) An agent shall maintain and submit to the Association at its request documentation that indicates proof of the declination required under subsection (a) of this section and that was relied upon by the agent in completing the Association's application for insurance coverage as set forth in §5.4902(b) of this division (relating to Additional Requirements). The proof must document the name of the authorized insurer that declined to offer coverage and the date of the declination. Documentation must be maintained either in writing or in an electronic format that may be printed by the agent. Documentation must be maintained for a period of not less than five years following the date of the submission of the application for Association coverage. The Association may also allow an agent to submit the requested documentation electronically in a manner that is acceptable to the Association.

(d) If the Association determines that a structure does not have a declination as required by this section, the Insurance Code §2210.202, and §5.4902(b) of this division, the Association may cancel insurance coverage on the structure. The Association shall provide the policyholder and the policyholder's agent with written notice of the cancellation not later than the 30th day before the effective date of the cancellation. In accordance with §5.4001(d)(3)(A)(ii) of this subchapter (relating to Plan of Operation), the notice of cancellation must state the reason for cancellation and provide the

policyholder with notice of their right to appeal the Association's action. If the policyholder, or the policyholder's agent, provides the Association prior to the date of the cancellation of the policy with proof of a declination as required by this section, the Insurance Code §2210.202, and §5.4902(b) of this division, the Association shall rescind the cancellation notice and continue coverage under the policy.

**§5.4905. Minimum Retained Premium.**

(a) Except as provided in this section, the minimum retained premium on an Association policy issued on an annual basis shall be:

(1) equal to the greater of:

(A) 90 days of the annual policy term or \$100, for policies that become effective on and after November 27, 2011; or

(B) 180 days of the annual policy term or \$100, for policies that become effective before November 27, 2011; and

(2) fully earned on the effective date of the policy. Unearned premium in excess of the minimum retained premium set forth in this subsection shall be refunded pro-rata.

(b) An Association policy canceled due to the reasons specified in paragraphs (1) - (4) of this subsection is subject to the \$100 minimum retained premium. The minimum retained premium shall be fully earned on the effective date of the policy. Unearned premium in excess of the minimum retained premium set forth in this subsection shall be refunded pro-rata.

(1) A change in majority ownership of the insured property, including sale of the insured property to an unrelated party, or foreclosure of the insured property;

(2) the replacement of the Association policy with other similar coverage in the voluntary market;

(3) the removal of the item(s) insured under an Association policy due to a total loss of the item(s), including demolition of the item(s); or

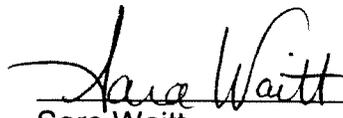
(4) the death of the policyholder.

(c) The Association shall not issue a new or renewal policy to an applicant who owes premium on a prior Association policy.

(d) The minimum retained premium shall not create or extend coverage beyond the policy's effective cancellation date.

**CERTIFICATION.** This agency hereby certifies that the adopted sections have been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Issued at Austin, Texas, on December 16, 2011.

  
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Sara Waitt  
Acting General Counsel  
Texas Department of Insurance

11-0966

TITLE 28. INSURANCE  
Part I. Texas Department of Insurance  
Chapter 5. Property and Casualty Insurance

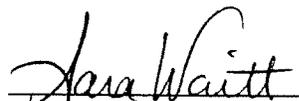
Adopted Sections  
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**IT IS THEREFORE THE ORDER** of the Commissioner of Insurance that amendments to §5.4903 and §5.4905 specified herein, concerning declination of coverage and minimum retained premium, are adopted.

**AND IT IS SO ORDERED.**

  
ELEANOR KITZMAN  
COMMISSIONER OF INSURANCE

ATTEST:

  
Sara Waitt, Acting General Counsel

COMMISSIONER'S ORDER NO. 11-0966

DEC 16 2011